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Ben Depoorter

UC Hastings College of the Law, depoorter@uchastings.edu

Jef De Mot

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THE CROSS-ATLANTIC LAW AND ECONOMICS DIVIDE: A DISSENT

Ben Depoorter*

Jef Demot**

While law and economics has become an established mode of analysis within the United States, it is generally asserted that law and economics “barely exists” in European countries. In order to support this claim, scholars have looked to various metrics, such as hiring of economists by law schools, publications in major journals, and law and economics conference participation, all of which suggest the United States as being significantly more advanced than Europe in its development of law and economics.

This Article states that the gap between the United States and Europe regarding the development of law and economics is greatly exaggerated. We argue that, due to the failure to control for institutional differences between academics in the United States and Europe, existing metrics fail to adequately capture the rate at which law and economics has developed in Europe.

In order to appreciate the contribution of law and economics in Europe, we emphasize the distinction between fundamental and applied domestic contributions to a field of scholarship. We suggest that a significant body of European law and economics scholarship fits in the applied group. Moreover, given the institutional obstacles to interdisciplinary research at European law schools, specifically the lack of incentives to produce such scholarship, the more puzzling question is why law and economics is practiced at European law schools as much as it is today. We find that the field of economic analysis of law has inspired impressive entrepreneurial efforts in Europe. The accomplishments of the law and economics movement in Europe are unfairly neglected when measuring scholarly productivity without accounting for institutional differences in educational markets.

* Professor of Law, University of California at Hastings College of Law; Visiting Professor, Duke Law School (Fall 2010); and Lecturer, Ghent University Law School. Email: depoor-ter@uchastings.edu. We extend our gratitude to the inspiring discussion generated by the participants of the Symposium in honor of Professor Ulen.

** Post-Doctoral Researcher (F.W.O.), Ghent University Law School; Scholar in Residence, Rotterdam Institute for Law and Economics.

I. INTRODUCTION

Law and economics has become an essential mode of analysis at many law schools in the United States. It is generally understood that economic analysis of law provides valuable insights to most, if not all, legal issues and policy debates.¹ Currently, the adaptation of more empirically grounded models is further increasing the integration of economic analysis at U.S. law schools.²

The presence of law and economics at law schools in the United States is evidenced by a host of factors, including the increase of hiring of economists, the amount of papers submitted to meetings of the American Association of Law and Economics, the rise of empirical legal studies, and the increase of new professors that work in the field of law and economics.³ Citation studies support the notion that law and economics has become a “prominent and perhaps predominant part of the tool set of the majority of law professors in the United States.”⁴ Another rough measure of the success of law and economics is the appearance of its concepts in core law reviews. For instance, a brief survey of articles included in the Westlaw database between 1998–2009 reveals that the term “transaction costs” appears in 1492 articles for the period of 2008–2009; up from 1084 in 2000–2001.⁵ By comparison, fundamental doctrinal terms such as “estoppel” and “fifth amendment” appear in, respectively, 2009 and 3121 articles during the same time period. Similarly, citation studies confirm that law and economics has become a standard toolkit in legal scholarship. Judge Richard Posner’s book *Economic Analysis of Law*, for example, gathers an impressive 2946 citations during the period of 1998–2000.⁶

In light of the success of law and economics in the U.S. legal academy, it is puzzling that economic analysis of law has not reached similar standing in the rest of the world. The singular success of law and economics in the United States is highlighted in contrast to the secondary role held by the discipline at European law schools. As Thomas Ulen

1. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 173–75 (1997).

2. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 909–14.

3. See, e.g., RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 204–06 (2004) (reporting, on the basis of data in the Association of American Law Schools (AALS) Directory of Law Teachers, a 69.92 percent increase of law and economics professors between 1992–1993 and 2002–2003).

4. Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1568–69 (2008).

5. Our survey was conducted in the Westlaw database “all law journals (Jlr)” for the period 1998–2009 for the term “transaction! Cost!”.

6. See *supra* note 5. Our elemental survey also illustrates the rise of other interdisciplinary fields closely related to law and economics, such as behavioral law and economics, and the literature on law and social norms.

and Nuna Garoupa characterize, “[a]lmost everyone who has moved between North America and Europe has the same strong sense that law and economics is vibrant, widespread, and dominant in North American law schools but that it barely exists in European law schools.”⁷ A host of different proxies support the observation that law and economics “barely exists” at European law schools. European law schools do not hire economists, prominent European law reviews publish relatively few law and economics-based articles,⁸ and law and economics scholars are underrepresented in major law and economics publications and at international law and economic conferences.⁹

Commentators have offered nearly every imaginable reason to explain the allegedly distant reception of law and economics across the continent. The lack of success of the discipline in Europe is related to, for instance, a hostile ideological and political climate in some European countries,¹⁰ path dependence in legal analysis,¹¹ the code-based approach of civil law systems,¹² the limited role of judge-made law,¹³ the absence of truly great European law and economics scholars,¹⁴ the undergraduate

7. Garoupa & Ulen, *supra* note 4, at 1568.

8. See Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 *RATIO JURIS* 66 (2004).

9. See Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, in *WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK* [GLOBAL DOMESTIC LAW: BOOK OF FRIENDS] 133 (Klaus Dicke et al. eds., 2005), *reprinted in* 44 *COLUM. J. TRANSNAT’L L.* 602, 616–19 (2006); Oren Gazal-Ayal, *Economic Analysis of “Law and Economics,”* 35 *CAP. U. L. REV.* 787–97 (2007); *see also* R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 *INT’L REV. L. & ECON.* 261, 261–63 (1991).

10. See Christophe Jamin, *Économie et Droit* [Economy and Law], in *DICTIONNAIRE DE LA CULTURE JURIDIQUE* [DICTIONARY OF LEGAL CULTURE] 578, 580 (Denis Alland & Stéphane Rials eds., 2003) (stating that French legal scholars view law and economics as a Trojan horse that would import neoliberalism and an Anglo-American worldview at the expense of French legal culture and tradition); Louis Vogel, *Foreword of* ANTHONY OGUS, MICHAEL FAURE, *ÉCONOMIE DU DROIT: LE CAS FRANÇAIS* [ECONOMY OF LAW: THE FRENCH CASE] 5–6 (2002) (contrasting the French interventionist and egalitarian to the market-based tradition of the United States and noting that law and economics is a poor fit for French law due to the comprehensiveness of the code system and the hierarchical judiciary system).

11. See Hans-Bernd Schäfer, *What Are the Practical Implications of Law and Economics Research in Germany?*, in *NEW FRONTIERS OF LAW AND ECONOMICS* 193, 194–97 (Peter Nobel & Marina Gets eds., 2006); Viktor Winkler, *Review Essay—Some Realism About Rationalism: Economic Analysis of Law in Germany*, 6 *GERMAN L.J.* 1033, 1042 (2005).

12. See Heico Kerkmeester, *Game Theory As a Method in Law and Economics*, in *ESSAYS IN LAW AND ECONOMICS II: CONTRACT LAW, REGULATION, AND REFLECTIONS ON LAW & ECONOMICS* 267, 282–83 (Boudewijn Bouckaert & Gerrit De Geest eds., 1995).

13. Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 *INT’L REV. L. & ECON.* 265, 267–69 (1991). Some argue that common-law systems are more receptive to law and economics because it is “under-theorized” with judges working incrementally, fitting seemingly new fact patterns into existing precedent without articulating the theory of the area of the law that the dispute represents. See Cass R. Sunstein, *Commentary: Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1750–54 (1995); *see also* RICHARD A. POSNER, *LAW AND LEGAL THEORY IN THE UK AND USA* 90, 92 (1996); RICHARD A. POSNER, *OVERCOMING LAW* 33–80 (1995); Richard A. Posner, *supra* note 8, at 74–75 (2004); Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 *INT’L REV. L. & ECON.* 3, 3–4 (1997) [hereinafter Posner, *Future*].

14. See Garoupa & Ulen, *supra* note 4, at 1568.

nature of legal education in Europe, the different nature of European legal services markets,¹⁵ the greater prestige of applied economics in the United States,¹⁶ different academic promotion and tenure standards,¹⁷ and a host of issues related to the lower level of competition among educational institutions and universities in Europe, such as low salaries and nepotistic hiring policies.¹⁸

In this Article, we argue that the gap between law and economics at law schools in the United States and Europe is greatly exaggerated.¹⁹ We find that law and economics activities are measured in reference to journals and publishing markets that are more closely attuned to the U.S. educational structure. As a result, most available evidence is biased toward a finding that law and economics is more developed in the U.S. legal academia. Instead, when taking into consideration the institutional differences between academic and professional markets in Europe and the United States, we suggest that law and economics in Europe is very much a successful discipline in its own right. In order to appreciate the contribution of law and economics in Europe, we emphasize the distinction between fundamental and applied domestic contributions to a field of scholarship. We suggest that most European law and economics scholarship mostly fits in the applied group. Moreover, given the institutional obstacles to interdisciplinary research at European law schools, specifically the lack of incentives to produce such scholarship, a puzzling, yet unexplored question, is why law and economics is practiced at European law schools as much as it is today. We find that the field of economic analysis of law has inspired impressive entrepreneurial efforts in Europe. The resulting accomplishments of the law and economics movement in Europe are unfairly neglected when measuring scholarly productivity without accounting for institutional differences in educational and publishing markets.

This Article is organized as follows. Parts II and III respectively examine and refute the available evidence in support of the viewpoint that law and economics scholarship has failed in Europe. Part IV focuses on educational organization and conference activities as benchmarks of suc-

15. See Dau-Schmidt & Brun, *supra* note 9, at 608–09 (highlighting how the undergraduate background of U.S. law students and the importance of student-edited law reviews are conducive to law and economics and other interdisciplinary approaches).

16. Posner, *Future*, *supra* note 13, at 4.

17. Garoupa & Ulen, *supra* note 4, at 1603–04.

18. *Id.* at 1605–07.

19. A different, but equally fascinating puzzle involves the claim that law and economics is relatively more intensely present in European economic departments than at their U.S. counterparts. Our explanation goes some way in explaining the presence of law and economics at European economics departments (i.e., there is a stronger consensus on the value and ranking of international, peer-reviewed publications; there are less up-front investments for individuals already trained in formal economics) but does not as easily explain the allegedly lower output observed at U.S. economic departments.

cess of an academic discipline. Part V explores the dynamics of the law and economics movement in Europe.

II. PUBLICATION OUTPUT AS A MEASURE OF SUCCESS AND FAILURE OF AN ACADEMIC DISCIPLINE

Law and economics “barely exists”²⁰ in European law schools, the field has “not flourished,”²¹ law and economics “seems curiously out of place in [the] work [of European scholars],”²² and European legal scholarship has been “largely resistant” to law and economics.²³ What foundation is there for these statements? One suspects that these observations are mostly based on personal observation. A few authors have, however, made attempts at quantifying the gap between the level of law and economics activities in Europe and the United States. As we discuss below, the nature of these proxies favor a finding that law and economics has not taken hold in Europe.

The most extensive empirical and comparative investigation of law and economics activities to date is *Economic Analysis of “Law and Economics”*²⁴ and *Economic Analysis of Law in North America, Europe and Israel*.²⁵ In these articles, Oren Gazal-Ayal examines the background of authors of law and economics papers listed in the table of contents of the following major law and economics journals: *American Law and Economics Review*; *Erasmus Law and Economics Review*; *European Journal of Law and Economics*; *Review of Law and Economics*; *International Review of Law and Economics*; *The Journal of Law, Economics, and Organization*; *Journal of Law, Economics and Policy*; *The Journal of Law and Economics*; *Journal of Legal Studies*; and *The Supreme Court Economic Review*. Covering the time period 2003–2005, Gazal-Ayal finds that the participation of the amount of lawyers per population is four times lower for Europe than the United States.²⁶ European authors are notably absent in prominent law and economics journals: “[o]nly 14% of the legal scholars authoring in [law and economics] journals are from continental Europe.”²⁷ European production is further reduced relative to the United States when nationality is determined on the basis of the

20. Garoupa & Ulen, *supra* note 4, at 1568.

21. Dau-Schmidt & Brun, *supra* note 9, at 604.

22. *Id.*

23. Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT’L & COMP. L. REV. 295, 295 (2008).

24. Gazal-Ayal, *supra* note 9.

25. Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. LAW & ECON. 485 (2007).

26. Gazal-Ayal, *supra* note 9, at 794–95, 806 tbl.1. In discussing the role of tenure and promotion standards, Gazal-Ayal explains the unusually high participation rate of Israeli scholars in law and economics (the data shows that contributions from Israeli scholars far outweigh contributions from any other country). *Id.* at 791–92, 806 tbl.1.

27. Gazal-Ayal, *supra* note 25, at 499.

current affiliation of the scholar, instead of the country where the first academic degree was obtained.²⁸

At first blush, the cross-continental discrepancy of the production rate in major law and economics journal is remarkable. Taking the quality and competitiveness of the journals examined by Gazal-Ayal as a given, his results suggest that scholars at European universities are considerably underrepresented as producers of law and economics scholarship.

Successful submissions to top-flight law and economics journals, such as the *International Review of Law and Economics*, are an inadequate measure of the success of an academic discipline in Europe. Placement in international peer-reviewed journals is highly competitive. Successful submissions require economic training and a level of mathematical sophistication that many lawyers lack. While the costs of entry are high, the payoffs of publishing in high-level journals are modest for many academics in Europe. As others have observed,²⁹ few legal scholars have incentives to publish in top international journals. Often, promotion and tenure standards at many European law schools do not distinguish between national and international publications. And even when international publications are valued, rarely do promotion standards encourage submissions to the most technical and competitive journals.

The lack of incentives and the absence of a clear consensus regarding a hierarchy among journals similarly explain the relative lack of law and economics publications in major European academic journals. Thomas Ulen and Nuno Garoupa, for instance, observed that fundamental economic terms, such as “efficiency” and “costs,” appear thirty to forty percent less in the *Oxford Journal of Legal Studies*, as compared to the top U.S. law reviews.³⁰ This should not, however, come as a surprise. Given the lack of incentives to publish in one international journal over another, there is little reason to assume that law and economics scholars would submit papers to this journal.³¹ In contrast, the salient ranking of U.S. journals and the connection to promotion and tenure rewards, provide U.S. scholars with ample incentive to submit to the top law reviews. Moreover, because of the fixed salary structure, European scholars generally do not have the same incentive to invest the time and effort to produce cutting edge scholarship—as is the case at U.S. law schools where annual raises are merit based and partly determined on the basis of annual scholarly performance.

28. Gazal-Ayal, *supra* note 9, at 795–96.

29. See Gerrit De Geest, *Law and Economics in Belgium*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS* 128, 128–30 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

30. Garoupa & Ulen, *supra* 4, at 1569.

31. To some degree, the character of the journal also explains this outcome. In contrast to, for instance, *The Journal of Legal Studies* in the United States, the *Oxford Journal of Legal Studies* does not feature prominent law and economics scholars on the editorial board.

To be clear, we do not intend to claim that European scholars have little incentive to publish. To the contrary, the existential credo of “publish or perish” is likely felt stronger in Europe today than before. Because of the absence of a large, unified publishing market and a hierarchy of journals, however, prestige and promotion opportunities in Europe are related to publication output as such. Publications matter but, there is less emphasis on placement as a matter of prestige. Given this incentive structure, academics at many European law schools are drawn to publishing opportunities at domestic journals or topic-specific journals and law reviews. Publications are more easily obtained at these journals. For instance, editors of these peer-reviewed journals often invite authors to submit a paper on a certain issue or recent case. The lower up-front investments involved in these publications also fit closer with the continental lawyer-as-professor model, in which law professors complement their modest academic salaries with income derived from private practice.

Recognizing the fact that “lawyers who write [law and economics] papers often publish in law reviews and not in [law and economics] journals,” Gazal-Ayal employs conference participation as a second-best indicator as to activity level of law and economics discourse per demography of participants at the American Law and Economics Association (ALEA) conferences of 2003–2005 and at the European Association of Law and Economics (EALE) conferences of these three years.³² Again, the data forces the conclusion that participation of lawyers from Europe is six times lower than in the United States. Overall, taking into account presence in law and economics journals and at conferences, the rate of participation of U.S. lawyers in law and economics is five times higher than in Europe.³³ The measurement, however, hardly offers conclusive evidence about the general state of law and economics in Europe. As with journals, it appears formal models are the gold standard for conference submissions. For law school participants, there is little incentive to produce such scholarship or to attend these conferences. Moreover, many European professors do not have the financial support necessary to travel abroad to these conferences.

In light of the European educational structure, it is not surprising that fewer European law professors end up in the table of contents of, for instance, *The Journal of Law and Economics* or as selected speakers at the annual meetings at the American Association of Law and Economics. The institutional incentives simply do not justify the investments re-

32. Gazal-Ayal, *supra* note 25, at 492–94. Gazal-Ayal acknowledges that “law review papers could not be counted here because it is impossible to strictly define [a law and economics] legal paper. . . . The number of publications in [law and economics] journals is therefore only an imperfect indication of the number of [law and economics] papers.” *Id.* at 504.

33. *Id.* at 494.

quired in order to produce fundamental contributions to law and economics scholarship.

III. THE GLASS HALF FULL: NATIONAL AND APPLIED PUBLICATIONS

Fundamentally, we suggest here that the success and accomplishments of a discipline are perhaps better judged in accordance with a given institutional structure. Although we agree with many of the observed differences in the literature that compares European and U.S. academic environments, we regard those differences rather as a starting point for the examination of the success of a discipline.

From this vanguard, it should not come as a surprise that fewer European law and economics authors make their way into the top law and economics journals. For instance, as Gazal-Ayal explains, the promotion and tenure standards at European law schools provide a straightforward explanation of why European scholars do not take the trouble to write the types of articles that can be submitted to competitive journals such as the *Journal of Legal Studies* or *The Journal of Law and Economics*. Because international publications are not rated much higher than invited domestic publications, and a ranking system of journal is absent in many European law school environments, the payoffs are simply too modest.

Instead, in many European countries, a substantial law and economics literature is published in domestic journals and law reviews. In many of these articles, academic lawyers apply fundamental and newly developed law and economics concepts to national policy issues, domestic case law, notes, literature and book reviews, and symposia. Similarly, topical journals, on European antitrust law for instance, regularly apply law and economics models to novel issues in European law. Taking a page out of the most recent bibliography of Dutch law and economics literature,³⁴ we find nineteen law and economics articles published by the Dutch scholar Heico Kermeester exclusively in journals that do not appear in any of the existing surveys that measure law and economics output.³⁵ In this case, these publications reflect a conscious decision, by someone trained in Europe and at the University of Chicago Law School, to be an active presence mainly in the domestic publishing market. Although many European journals that publish law and economics do not have the esteem of a journal like *The Journal of Law and Economics*, they are widely

34. Rudi W. Holzhauser & Rob Teijl, *Law And Economics in the Netherlands*, in *ENCYCLOPEDIA OF LAW & ECONOMICS*, *supra* note 29, at 274, 292–93.

35. Some of the featured journals include *Overheidsrechter Gepasseerd* [Public Judge Passed], *Tijdschrift voor Rechtsfilosofie en Rechtstheorie* [Journal of Philosophy of Law and Legal Theory], *Weekblad voor Privaatrecht* [Private Law Weekly], *Notarisambt en Registratie* [Notary and Registration Office], *Delikt en Delinkwent, Recht en Kritiek* [Delikt Offender, Law and Critique], and *Nederlands Juristenblad* [Dutch Lawyers Journal]. *Id.*

read by local academics and practitioners.³⁶ By focusing on major, fundamental law and economics contributions, the surveys conducted by Garoupa, Ulen, and Gazal-Ayal neglect this major component of law and economics activities in Europe.³⁷ Note that this body of literature involves deliberate applications of law and economics concepts and extends beyond those situations, observed by Hans-Bernd Schäfer in Germany, where legal scholars use economic arguments *de facto*, without direct or open reference to the literature.³⁸

But there is more to the success of a discipline than publishing output. The fact that the European institutional setting fails to provide optimal incentives to produce as many fundamental contributions to law and economics scholarship as elsewhere, certainly falls short of proving that law and economics “barely exists” in Europe. Surely, there is value in local and applied contributions to law and economics scholarship. Next, we highlight a few other contributions of the law and economics movement in Europe.

IV. BENCHMARKS OF EUROPEAN LAW AND ECONOMICS

How does one measure the “success” of the law and economics movement in Europe? It is difficult to assess the overall accomplishment of an academic discipline. In the European context, the different languages used in the panoply of publications across various countries further complicates such effort.³⁹ A comprehensive documentation of law

36. In this instance, the decision to publish in local markets, rather than international journals, may have contributed to this scholars’ judicial appointment at the court of commerce (Raadsheer at College van Beroep voor het Bedrijfsleven).

37. Gazal-Ayal indeed admits that his definition of law and economics scholarship is narrow and likely excludes many legal papers that contain consequential arguments or describing the economic effect of legal rules. See Gazal-Ayal, *supra* note 9, at 793–94. Gazal-Ayal writes that “[o]ne can argue that lawyers use economic arguments without being part of the international [law and economics] movement.” *Id.* at 793. I suspect that we are indeed making this argument here. Gazal-Ayal suggest more specifically that his survey measures law and economics defined as a “field of research that follows the works of Ronald Coase, Gary Becker, Guido Calabresi, and Richard Posner” and that “[a]t the risk of being inaccurate,” his survey of law and economics journals and conferences are good representatives of law and economics consisting of work that makes “conscious use of economic models and methodology in legal reasoning.” *Id.* at 793–94. Both of these definitions are problematic for the purposes of accessing the state of law and economics in Europe. It is our experience that many publications by European lawyers do indeed make conscious use of prior law and economics models. These articles and notes in domestic law reviews are not included in a survey of international law and economics journals. Instead, a survey of international law and economics journals captures law and economics scholarship narrowly defined as making theoretical or empirical fundamental contributions to the field. Although a comprehensive measure of law and economics scholarship, it neglects the value of applied writings.

38. See Garoupa & Ulen, *supra* note 4, at 1609–10; Gazal-Ayal, *supra* note 25, at 490.

39. In regards to success being difficult to measure, Gazal-Ayal, for instance, acknowledged that: [A]ggregating data about Europe is always tricky, since the cultural differences within Europe are greater than within the United States. However, examining each country is also problematic because the number of samples is too small to have any statistical validity. In any case, an examination of the data from each country indicates that the similarities are sufficient for aggregation.

and economics publications in Europe requires local knowledge of multiple publishing markets. This difficulty has caused many, especially U.S.-based, observers to not only overlook the applied contributions described above, but also to neglect path-breaking work by European law and economics scholars. One prominent example is the work of the Italian scholar Pietro Trimarchi, who at the same time as Ronald Coase and Guido Calabresi were working on their seminal articles, published a path-breaking book on strict liability “entirely based on concepts such as the allocation of risks to the least cost insurer or recourse to strict liability to induce potential wrongdoers to adopt optimal precautions.”⁴⁰

The finest qualitative survey of law and economics to date is contained in the *Encyclopedia of Law and Economics*.⁴¹ A decade ago, the editors of this imposing volume invited European law and economics scholars from different European countries to describe the development of law and economics activities in their countries and to furnish a bibliography. The resulting description and bibliography of “non-English” publications, although certainly outdated at this point, counts almost 240 pages.

It is not our intention to add to the literature a more accurate quantitative measurement of law and economics publications in Europe. Nevertheless, we believe it is helpful to highlight a few prominent accomplishments of the law and economics movement in Europe. We focus on two benchmarks of success of an academic discipline—educational organization and conference activities. With regard to these factors as well, the accomplishments of the law and economics movement in Europe are often minimized or neglected by observers that look to the United States as a role model while failing to account for institutional differences in educational institutions.

A. Educational Organization

The integration of law and economics concepts into the core curriculum at U.S. law schools is one benchmark used to make the argument that law and economics has succeeded in the United States but failed in

Gazal-Ayal, *supra* note 25, at 505. But the problem is underestimated. Only the *Encyclopedia of Law and Economics*, which includes entries and bibliographies per country authored by native speakers closely connected to the field, has undertaken a real effort to resolve this issue. See *ENCYCLOPEDIA OF LAW AND ECONOMICS*, *supra* note 29.

40. Roberto Pardolesi & Giuseppe Bellantuono, *Law and Economics in Italy*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS*, *supra* note 29, at 244, 244–45 (referencing PIETRO TRIMARCHI, *RISCHIO E RESPONSABILITÀ OGGETTIVA* [RISK AND STRICT LIABILITY] (1961)). “A later article, also translated into German, applied the tools already employed in the field of tort law to breach of contract cases.” *Id.* at 245 (referencing Pietro Trimarchi, *Sul Significato Economico dei Criteri di Responsabilità Contrattuale* [Economic Meaning of Contract-Liability Criteria], *RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE* [TRIMESTER REVIEW OF LAW AND ECONOMICS] 512, 512–31 (1970)).

41. See *ENCYCLOPEDIA OF LAW AND ECONOMICS*, *supra* note 29.

Europe. The integration of essential law and economics concepts, such as “efficient breach” and “coming to the nuisance” in basic tort law and property law courses, certainly adds to the perception that law and economics has come of age in the legal academy in the United States. Again, however, the impact of institutional factors must be recognized. For instance, the mainstay integration of law and economics is substantially aided by the pyramid structure of U.S. law schools, where a few select law schools provide most of the graduates that enter the teaching profession. This trickle-down effect is bolstered by the fact that law and economics is disproportionately represented, perhaps because of Olin Foundation funding, at the top law schools.⁴² Even though some European academics obtain LLM degrees in the United States, no similar trickling down effect exists in Europe. Instead, senior professors in Europe often determine the scholarly orientation of their successors.

Despite these institutional differences, law and economics figure prominently as an academic tool at many European universities. The influence of law and economics in Europe is especially strong at the graduate level. One prominent example is the European Master in Law and Economics. Students are awarded a master degree (LLM/MA/MSc) after completing an intense one-year program in law and economics. Annually, about ninety students complete a curriculum that include courses such as microeconomics, comparative law and economics, economic analysis of tort law, economic analysis of property law, economic analysis of contract law, antitrust law and economics, corporate law and economics, and public law and economics.⁴³ Based on a partnership between several law schools (Hamburg, Ghent, Rotterdam, and Haifa) and economics departments (Bologna, Vienna, Warsaw, Aix-en-Provence, and Mumbai), the Erasmus Mundus program in law and economics annually grants a substantial number of scholarships, including full scholarships to non-European students.⁴⁴ Other European master’s programs in law and economics include Utrecht University, Bocconi University, and the University of Amsterdam.

On a more advanced level, European institutions offer an increasing amount of fully integrated PhD programs in law and economics. For instance, the European Doctorate in Law and Economics, organized by the Universities of Bologna, Hamburg, and Rotterdam, with the collaboration of the Indira Gandhi Institute of Development Research, graduates fifteen students each year who have completed an especially designed

42. For the argument that the Olin Foundation played a pivotal causal role in the success of the law and economics movement, see Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 272–84 (2003).

43. See *Programme Structure*, EUR. MASTER L. & ECON., http://www.emle.org/Subpages_rubric/index.php?rubric=EMLE_Programme_Structure (last visited July 10, 2011).

44. See *Welcome!*, EUR. MASTER L. & ECON., http://www.emle.org/_EMLE_Main_rubric/index.php?rubric=Home&PHPSESSID=pordu8k20g577la2so126q6mj5 (last visited July 10, 2011).

curriculum in law and economics.⁴⁵ Another major PhD program in law and economics is the International Programme in Comparative Analysis of Institutions, Economics and Law (IEL), which is a collaboration between Turin Interuniversity Centre for the Comparative Analysis of Law and Economics, Economics of Law, Economics of Institutions (CLEI), Cornell Law School, the Centre de Recherche en Gestion École, Polytechnique in Paris, and Ghent University Law School in Belgium.⁴⁶ Like the EDLE program, this three-year doctoral program offers full scholarships to all participants. Study for this degree begins at the Università di Torino (Turin) and continues with research, which may be undertaken there, at other partner schools, or elsewhere.

Graduates of these programs are prepared for academic careers or for positions in government, research organizations, international consulting groups, public organizations, multinational law firms, and consultancy firms. The writings by these graduates are another stream of output that finds its way into some of the domestic and topic-specific journals described above.

Although we do not suggest that overall these programs carry the same weight as the integration of law and economics in the core curriculum of first year courses at many U.S. law schools, these unique European graduate programs at, or in participation with European law schools, offer a more immersed and specialized training in law and economics than available at most law schools in the United States.⁴⁷

B. Conference Activities

The participation of scholars at law and economics conferences is another benchmark that is sometimes offered in evidence of the more dynamic nature of law and economics in the United States.⁴⁸ Scholars from the United States are more prominently represented at the major international conferences; many U.S. law schools have a dynamic workshop circuit in law and economics, etc. Again, institutional factors account for some of the differences. European scholars are at a disadvantage because of differences in funding and travel budgets. Most

45. See *Welcome!*, EUR. DOCTORATE L. & ECON., http://www.emle.org/_EMLE_Main_rubric/index.php?rubric=Home&PHPSESSID=pordu8k20g5771a2so126q6mj5 (last visited July 10, 2011).

46. See *Welcome!*, INT. PROGRAMME INSTS., ECON. & L., <http://www.iel.carloalberto.org> (last visited July 10, 2011).

47. Vanderbilt University is one exception where a U.S. law school recently instituted a law and economics doctorate. For more information, see *Ph.D. Program in Law & Economics*, VAND. U. L. SCH., <http://law.vanderbilt.edu/academics/academic-programs/phd-program-in-law--economics/index.aspx> (last visited July 10, 2011). Law students in the United States can only specialize in law and economics by enrolling in a SJD/JSD program. The focus of such programs, however, is on independent research. Rarely, if ever, do law schools offer a specially designed curriculum program in law and economics.

48. See *supra* note 32 and accompanying text.

academics at European law schools are not part of a funded research center or do not have annual research and travel budgets, as is customary at U.S. law schools. Nevertheless, this observation has often clouded the fact that Europe has overcome some of these obstacles in unique ways in order to create an active European law and economics community. Take for instance the EALE founded in 1984. Founded seven years before its U.S. counterpart, The American Association of Law and Economics,⁴⁹ this academic association not only held twenty-seven annual conferences in most major European cities, it was also able to overcome the lower funding and mobility of European scholars by engaging local organizing universities to sponsor the conference dinner and accommodation expenses of all selected speakers. More recently, the conference activities of the EALE in Europe have been supplemented by initiatives on domestic levels to create national academic associations and annual national conference in law and economics. Examples include Italian, Israeli, and German law and economics associations and meetings.

V. LAW AND ECONOMICS ENTREPRENEURS IN EUROPE

Given the institutional obstacles to interdisciplinary research at European law schools, specifically the lack of incentives to produce such scholarship, a puzzling, overlooked question becomes why law and economics is present at European law schools as much as it is today. Because educational funding is zero-sum, professors that institute graduate programs in law and economics often face adversity and criticism by colleagues at their home institutions. Promotion or tenure opportunities are rarely enhanced by instituting major collaborative educational programs across countries. Moreover, such programs are costly to public institutions that offer education at tuition rates that are below cost.

Although the institutional conditions have been anything but conducive to promoting legal innovation and interdisciplinary activity at European law schools, considerable strides have been made. The available evidence attests to the appeal and the persuasion of law and economics as a discipline. A few U.S. scholars, most prominently Robert Cooter and Thomas Ulen, have played an instrumental role in generously donating their time and effort to support the law and economics movement in Europe. But it is also clear that law and economics scholarship has inspired a great deal of European scholars into making enormous entrepreneurial efforts to import the discipline into European academics. A generation of pioneers, including Göran Skogh, Wolfgang Weigel, Michael Faure and Roger Van den Bergh; Boudewijn Bouckaert and Gerrit De Geest; and Claus Ott and Hans-Bernd Schäfer have made massive efforts to convince their home institutions, colleagues, and administrators

49. See *About the American Law and Economics Association*, AM. L. & ECON. ASS'N, <http://www.amlecon.org/assoc.html> (last visited July 10, 2011).

to support new master and PhD programs, conferences, and academic associations in law and economics.

We agree with Gazal-Ayal, Garoupa, and Ulen that tenure standards, level of competition, and universally accepted benchmarks of scientific quality might help explain the lower production of top international, interdisciplinary scholarship by the European legal academy. But we believe that, despite the institutional obstacles, law and economics has made great strides in Europe—law and economics training in Europe is deeper, the scholarly applications are wider and more local, and conference activities have been steady. With time, the cross-continental differences between law and economics might well dissolve. The integration of European markets and the increased level of competition in post-graduate programs are two major factors that might contribute to a harmonization. But until then, we hope that our observations here provide some caution against the overdrawn claims that law and economics has failed in Europe.